SUPREME COURT, U. S.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. ~~1208~~ 75

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON,, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

—vs—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as Mother and Next Friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as Mother and Next Friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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STATEMENT

The Final Order of the United States District Court for the Middle District of Alabama, Northern Division, from which the Appellants appeal is set out as Appendix "A" of Appellants' Jurisdictional Statement, at pages 13 through 23 thereof. Sections 4, 52, 121, 122, 123, 172 and 183 of Title 45, Code of Alabama, Recompiled 1958, held invalid by the District Court, are set out at pages 24 through 26 of said Jurisdictional Statement. Said Final Order and said Code sections are incorporated herein by reference thereto.

If this Court should conclude that said Code sections are, on their face, unconstitutional, and the decision of the District Court is to be affirmed insofar as the validity of said sections is concerned, the Appellants take the position that this case nevertheless presents other questions of substantial and public importance as to require plenary consideration, with briefs on the merits and oral argument for their resolution.

ARGUMENT

The Appellees in their Motion to Affirm state that the "... due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States follow Appellees into prison and protect them from unconstitutional action on the part of prison authorities carried out under color of State law ..." The cases heretofore decided by this Court, and cited by Appellees to sustain their position, do not so hold. *Cooper vs. Pate*, 378 U.S. 546 (1965), so cited, merely holds that a State prisoner's claim that because of his religious beliefs he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners should not be dismissed without a hearing. No question of prison discipline and internal security is presented by the pleadings presented to this Court. This Court necessarily held that on a motion to dismiss the Court must take the allegations of the pleadings as true. It does not follow that upon the presentation of an answer setting up prison discipline and internal security as an explanation or defense for the said action of the prison officials this Court would subordinate prison discipline and security to *Cooper's* alleged constitutional rights which he would enjoy were he not a prisoner.

The other Supreme Court case cited by Appellees is *Cochran vs. Kansas*, 316 U.S. 255 (1941). The *Cochran* case grew out of a habeas corpus proceeding and at issue was the right of the State of Kansas to imprison Cochran under the sentence imposed. Such a proceeding by a prisoner has long been recognized and is not disputed. It is no authority for any issue

in this case. The *Cochran* case clearly did not involve any issue of prison discipline and security.

The very fact that the Appellees can cite no other cases of this Court on the extent to which constitutional rights follow a prisoner into prison sustains the Appellants in their request that this Court set this appeal down for consideration on briefs and oral argument. Certainly, neither *Cooper, supra,* nor *Cochran, supra,* furnishes any guide to a full answer to this very important question.

In taking this Appeal the Appellants are not unmindful of the decision of the United States District Court of the District of Columbia, reported in *Edwards vs. Sard,* at 250 F. Supp. 977, wherein the District Court stated that " . . . the plaintiffs in this case will prevail in their suit if they convince the court that a policy of racial discrimination has been followed in making dormitory assignments at Lorton (a reformatory)." Neither do we overlook the decision of the Fifth Circuit Court of Appeals in the case of *Singleton vs. Board of Commissioners of State Institutions, et al.,* 356 F. 2d 771, wherein the Circuit Court opined that " . . . the Supreme Court effectively foreclosed the question of whether a State may maintain segregated schools. The principle extends to all institutions controlled or operated by the state. It is no longer open to question that a state may not constitutionally require segregation of public facilities. *Johnson vs. Virginia,* 1963, 373 U.S. 61, 62, 83 S.Ct. 1053, 1054, 10 L.Ed. 2d 195."

Edwards vs. Sard, supra, the District Court case referred to above, involved dormitory housing at a Federal Reformatory of the District of Columbia. The ratio of Negroes and whites at Lorton was about ten Negroes to one white. Of the twenty-two dormitories at Lorton only six were integrated. In *Edwards, supra,* Mr. Charles M. Rogers, Deputy Superintendent of Lorton, who is in charge of making dormitory assignments and is himself a Negro, testified that he considered the race of prisoners as one factor in deciding which dormitory to assign them to. The *Edwards* case cited above also indicates that Mr. Thomas R. Sard, Director of Corrections, considered

race as material in the assignment of dormitory space to prisoners. The District Court in this case, in its opinion stated that " . . . Mr. Sard indicated a sincere awareness of the desirability of achieving the greatest possible intermingling of the races consistent with the *security of the institution.*" (Emphasis added) To further show the relation of race and prison security, Mr. Sard, in the *Edwards case, supra,* testified as follows: "We would like very much to have every dormitory we have integrated if we had a sufficient proportion of white to Negro to do this *safely.*" (Emphasis added) Note, in *Edwards, supra,* bottom of page 980, 250 Fed. Supp., the Court granted judgment for the defendants after it found in effect that the procedures at Lorton (although only six of twenty-two dormitories were integrated and race was considered in the assignment of prisoners) were satisfactory, they being "consistent with the security of the institution."

Singleton vs. Board of Commissioners of State Institutions, 356 F. 2d 771, decided by the Fifth Circuit and referred to above, involved only the reform schools of the State of Florida. Said case primarily involves the question as to whether the case had become moot. It does not discuss prison security. In fact, said case did not involve a prison but involved reform schools. The plaintiffs were being educated in the schools. It was alleged that certain courses and recreational facilities available to white children were not available to Negro children. In view of the posture of said case, the application by the Fifth Circuit of *Brown vs. Board of Education of Topeka,* 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 878, is not without plausible argument. However, we submit that it is not persuasive authority for consideration in this case against the Appellants, since it does not involve or determine the question of "prison security," which must be considered in passing upon claimed constitutional rights of prisoners.

When a prisoner is placed in jail, he has only such rights, including constitutional rights, as will not impair prison discipline or internal security. *Sostre vs. McGinnis,* 334 F. 2d 906, *cert. den.* 85 S.Ct. 168, 379 U.S. 892, 13 L.Ed. 2d 96.

Freedom of speech, a constitutional right, is not available to a prisoner in jail. *McClaskey vs. Maryland*, 337 F. 2d 72.

The right to receive letters in prison may be limited. *United States vs. Illinois, et al.*, 343 F. 2d 120.

Religious Freedom, a constitutional right, may be limited in prison. *Sostre vs. McGinnis*, 334 F. 2d 906, *cert. den.*, 85 S.Ct. 168.

The attendance at a prison school may be denied. *United States vs. Pate*, 229 F. Supp. 818.

The right of a prisoner to receive mail yields to the requirement of maintaining internal discipline of prison. *United States vs. Fay*, 197 F. Supp. 855.

In *Jones vs. Willingham*, 248 F. Supp. 791, the Court in its decision sets out some important principles relating to rights of a prisoner as follows:

> "Imprisonment carries with it many restrictions. 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). '*A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline.*' Sostre v. McGinnis, 334 F. 2d 906, 908 (2d Cir., 1964), cert. denied, 379 U.S. 892, 85 S.Ct. 168, 13 L.Ed. 2d 96 (1964). '(E)xcept in extreme cases, the courts will not interfere with the conduct of a prison, with the enforcement of its rules and regulations, or its discipline * * * .' Childs vs. Pegelow, 321 F. 2d 487, 491 (4th Cir., 1963), cert. denied, 376 U.S. 932, 84 S.Ct. 702, 11 L.Ed. 2d 652 (1964). One committed to prison, however, does not on entering the place of his confinement leave his constitutional rights at the gates. Pierce v. LaVallee, 293 F. 2d 233 (2d Cir., 1961). The issue here may be stated as it was in the Pierce case:

> "' * * * Either the plaintiffs were punished solely because of their religious beliefs or they were not. If they were, the defendant's conduct violates * * * the United States Constitution. If the plaintiffs were punished for legitimate reasons * * * (the) law is (not) violated' l.c. 235-236." (Emphasis added)

In *Price vs. Johnston*, 1948, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356, this Court recognized the general rule of law that:

> "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system."

From the above decisions it is clear that in dealing with alleged rights and claims of prisoners the courts have held that the dominant issue to be determined is not whether such alleged rights or claims are bottomed upon constitutional provisions, but if so bottomed what effect, if any, will the recognizing or granting thereof have upon prison discipline and security. The Appellants have not found and the Appellees have not cited any federal case where prison discipline and security was considered and subordinated to any claimed constitutional right. The very nature of a prison requires that prison discipline and security be dominant.

The Appellants contend that the Plaintiffs have no right to ask the court to substitute the judgment of the court as to prison discipline and security for the judgment of the prison administrators, who are responsible therefor.

The importance of not disturbing the determination of prison officials as to prison discipline and security was forceably recognized by the United States Court of Appeals for the Seventh Circuit in *Walker vs. Pate*, 1966, 356 F. 2d 502, where the court held that prisoner's various complaints as to his not being permitted to keep some law books and to receive visits

by his wife and daughter were matters within scope of prison's discipline and security, and did not state a claim under the Sixth and Fourteenth Amendments or Federal Civil Rights Act. In this case, the opinion set out for the benefit of inmates of state prisons within the Seventh Circuit the following:

> "Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody. Discipline reasonably maintained in State prisons is not under the supervisory direction of federal courts . . . A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in volation of his constitutional rights."

An individual warden or jailer owes a duty to a prisoner placed in his custody to keep the prisoner safely and free from harm according to *Cohen vs. United States*, 252 F. Supp. 679 (1966). If the duty to keep a prisoner free from harm is in the warden and the jailer, should not they rather than the federal courts determine what is reasonably necessary to insure such safety? The importance of this is made crystal clear when we consider that in the *Cohen case, supra*, an award of $110,000 to the prisoner was approved by the District Court because of the negligence of prison administrators in permitting prisoner Cohen to be assaulted by a fellow inmate and seriously injured while in prison. The duty is on the wardens and jailers to safeguard prisoners in their jails. This being so, a court should not grant an injunction against a warden or jailer which injunction, if granted, will decrease the safety of prisoners and jail personnel.

CONCLUSION

The Appellants respectfully submit that should the said sections of Title 45, Code of Alabama, Recompiled 1958, set

out at pages 24 through 26 of the Appellants' Jurisdictional Statement, and held invalid on their face by the District Court, be likewise held invalid by this Court, such holding should not result in a summary affirmance in full of the Final Order appealed from, but that this case should be set down for plenary consideration, with briefs on the merits and oral argument for resolution as to the extent, if any, to which prison administrators may in the absence of statute segregate prisoners according to race when in their judgment it is reasonably necessary to so segregate in order to maintain prison discipline and security. Should said state statutes be held invalid on this appeal, it will still be of very great importance to the public and prison officials throughout this nation for prison administrators to know the limits of their authority in the absence of such statutes to require some racial segregation or full racial segregation in their jails, the extent thereof to be determined by the reasonable judgment of such prison administrators who are directly responsible for the safety of their prisons.

The Appellants say that the questions presented by this Appeal are so substantial and are of such public importance as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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